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No. 14-1175

In the Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 39 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which held that the States are not immune from suit in the courts of other States, should be overruled because it conflicts with the historical understanding of sovereign immunity, the structure of the Constitution, and this Court's more recent decisions.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming—have a significant interest in the protection of the full scope of sovereign immunity that they enjoy under the Constitution, including immunity from suits in other States. Sovereign immunity is an "integral component of that 'residuary and inviolable sovereignty' retained by the States." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002) (quoting The Federalist No. 39) (internal citations omitted). It protects the States from "judgments that must be paid out of a State's treasury," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), which would otherwise undermine a State's ability to make policy decisions by sapping scarce resources that could be allocated in other ways, *Alden v. Maine*, 527 U.S. 706, 750–51

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel for all parties of its intent to file an *amicus* brief in support of Petitioner.

(1999). Sovereign immunity also prevents the subjection of a State to "the indignity of . . . the coercive process of judicial tribunals." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

For over 35 years, the States have been subject to suits in the courts of other States under this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), which is an outlier among this Court's sovereign immunity jurisprudence. As the State of West Virginia and 33 other States explained in an *amicus* brief filed in support of another petition currently pending before this Court that also seeks to overrule *Hall*, *amici* have a strong interest as sovereign States in any case that presents an opportunity for this Court to overturn *Hall* and vindicate the full scope of *amici*'s constitutional immunity from suit. Because the legal issues are identical, this brief presents arguments similar to those in the earlier-filed *amicus* brief and differs primarily in its explanation of how the facts in this case uniquely illustrate the problems with *Hall*.

REASONS FOR GRANTING THE PETITION

The time has come for this Court to revisit its decision in *Nevada v. Hall*, which held that States are not immune from suits in the courts of other States. The Court in *Hall* avoided both the structure and the history of the Constitution to reach its holding. 440 U.S. 410, 418–27 (1979). But this Court's decisions since *Hall* have established that

immunity is implicit in the structure of the Constitution and that an examination of the history of sovereign immunity is a necessary part of any sovereign immunity analysis. *Alden v. Maine*, 527 U.S. 706, 727–28 (1999). Those cases make *Hall* an aberration that cannot be justified under this Court's approach to questions of sovereign immunity.

In *Hall*, the Court expressly rejected the possibility that the immunity of States might be implicit in the structure of the Constitution. 440 U.S. at 424–27. The Court reasoned that, because neither the text of Article III nor the Eleventh Amendment provided the States immunity from suit in the courts of other States, such immunity was not an explicit part of the Constitution. *Id.* at 420. And it declined to "infer[]" immunity "from the structure of our Constitution and nothing else." *Id.* at 426.

Hall also specifically disregarded evidence of the understanding of the immunity of States at the time of the ratification of the Constitution and the Eleventh Amendment. *Id.* at 418–19. The Court acknowledged that sovereign immunity was "[u]nquestionably . . . a matter of importance in the early days of independence." *Id.* at 418. But because "[t]he debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III," the Court concluded that "the question whether one State might be subject to suit in the Courts of another State was apparently not a matter of concern when the new

Constitution was being drafted and ratified." *Id.* at 418–19. The Court similarly dismissed the understanding of immunity evidenced by the enactment of the Eleventh Amendment because "all of the relevant debate[] concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." *Id.* at 420–21.

The Court in *Hall* instead relied on the decision of this Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), to conclude that each State had discretion to choose not to extend immunity to other States. 440 U.S. at 416–18. *Hall* read *The Schooner Exchange* to stand for the proposition that sovereign nations determine for themselves whether to extend immunity in their courts to other sovereign nations. *Ibid.* Reasoning that States stand in a relationship to one another similar to the relationship between nations, the Court thus held that only principles of comity prevented one State from being sued in the courts of another. *Id.* at 417–18, 421. But the Court admitted that this rule would not have applied if it had found "a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." *Id.* at 418.

Hall was wrong when it was decided and is wrong today. As this Court has since made clear, the

structure of the Constitution implies that the States are immune from suit in the courts of other States, and the history of sovereign immunity supports this conclusion. Yet as this case aptly demonstrates, States remain subject, at the discretion of courts in other States, to suits that undermine their ability to govern according to their own political processes. This case, in which a California state agency has been sued in a Nevada court for the enforcement of the State of California's tax policy, illustrates the need for this Court to correct the erroneous reasoning in *Hall*.

This Court should grant certiorari and overrule *Hall*.[2]

I. *HALL* CONFLICTS WITH THIS COURT'S RELIANCE ON THE STRUCTURE OF THE CONSTITUTION IN SOVEREIGN IMMUNITY CASES.

A. This Court's decisions since *Hall* have rejected that case's reasoning that the scope of the States' sovereign immunity is limited to what the explicit guarantees of the Constitution provide. The sovereign immunity of the States is based not on a particular textual grant but on "the structure of the

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[2] *Hall* also addressed whether the Full Faith and Credit Clause of the Constitution required California to respect Nevada's limited waiver of immunity. 440 U.S. at 421–24. The Court concluded that it did not but that a State could be required to give the policy of another State full faith and credit if it implicated our system of cooperative federalism. *Id.* at 424 n.24. That issue is not addressed in this brief.

original Constitution itself." *Alden v. Maine*, 527 U.S. 706, 728 (1999); see also, *e.g.*, *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267–68 (1997) (explaining that a "broader concept of immunity" is "implicit in the Constitution"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (confirming that the Eleventh Amendment is important for "the presupposition . . . which it confirms" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). This constitutional immunity is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713; see also *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) ("The Convention did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework.").

These decisions find their primary support in the reaction to this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that a private citizen could sue a State in federal court. *Id.* at 450–53 (Blair, J.); *id.* at 468 (Cushing, J.); *id.* at 461–66 (Wilson, J.); *id.* at 478–79 (Jay, C.J.). The decision "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720 (quoting 1 C. Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)). Both Houses of Congress approved the Eleventh Amendment, which provides that the

power of the federal courts will not be construed to extend to a suit brought by an individual against a State, with almost unanimous votes after a single day of discussions. *Id.* at 721. The States then ratified the Amendment quickly. *Fed. Mar. Comm'n*, 535 U.S. at 752. Critically, the text of the Eleventh Amendment did not "codify[] the traditional understanding of sovereign immunity" but instead "address[ed] the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision." *Alden*, 527 U.S. at 723. Nevertheless, this Court has found that the "natural inference" from the circumstances surrounding the Amendment's adoption is that "the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits." *Id.* at 724. On that basis, this Court has concluded that "the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Id.* at 713. Instead, the Eleventh Amendment points to "the broader concept of immunity, implicit in the Constitution." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267–68.

B. Under this now "settled doctrinal understanding" that the structure of the Constitution is the source of the States' sovereign immunity, it is readily apparent that *Hall* cannot continue to stand. *Alden*, 527 U.S. at 728. The founders included several provisions in the

Constitution that expressly provide a neutral federal forum for certain interstate disputes. For example, this Court has original jurisdiction over suits between two or more States. U.S. Const. art. III, § 2, cl. 2. Similarly, the federal courts were given jurisdiction over suits "between a State and Citizens of another State." U.S. Const. art. III, § 2, cl. 1. These provisions evince a design by the founders to ensure the availability of a neutral federal forum for cases in which a State is properly a party. Cf. Amy Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 259–263. And implicit in that design is that such disputes would or could not be heard in state courts for some reason, including that States had the option to assert immunity in their own courts or the courts of other States.

Indeed, members of the founding generation expressly noted that these constitutional provisions assumed the immunity of States in the courts of other States. In his 1790 Report on the Judiciary to the House of Representatives, the first Attorney General of the United States, Edmund Randolph, explained that the Constitution confirmed that the States would remain immune from suits in the courts of others States "by establishing a common arbiter in the federal judiciary, whose constitutional authority may administer redress." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT 130 (Maeva Marcus, ed., 1992).

The sovereign immunity of States in their sister States is also implicit in the ratification of the Eleventh Amendment. That amendment removes actions commenced by a citizen of another State from the jurisdiction of the federal courts. U.S. Const. amend. XI. If the ratifiers of the Eleventh Amendment had thought that the Constitution permitted a State to be sued in the courts of another State, the States would have "perversely foreclosed the neutral federal forums only to be left to defend suits in the courts of other States." *Hall*, 440 U.S. at 437 (Rehnquist, J., dissenting).

Hall turns the constitutional structure on its head. States are generally immune from suits in federal court, U.S. Const. amend. XI, and are immune from suits in their own courts, *Alden*, 527 U.S. at 754. But *Hall* makes States susceptible to suit in the potentially biased courts of other States subject only to the other States' decisions to extend comity. *Hall*, 440 U.S. at 418, 421. This Court should grant certiorari and vindicate our Constitution's structure.

II. *HALL* CONFLICTS WITH THIS COURT'S RELIANCE ON THE HISTORY OF SOVEREIGN IMMUNITY.

A. This Court's decisions since *Hall* have established, too, that *Hall* was wrong to reject "history and experience, and the established order of things," in determining whether States are immune from suit in the courts of other States. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Hans v.*

Louisiana, 134 U.S. 1, 14 (1890)). The immunity retained by the States is the immunity that the States "enjoyed before the ratification of the Constitution . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. An examination of the historical understanding of sovereign immunity is thus critical to defining the scope of the States' immunity. That historical evidence includes "the ratification debates and the events leading to the adoption of the Eleventh Amendment," which "reveal the original understanding of the States' constitutional immunity from suit." *Id.* at 726.

Importantly, this Court has relied on ratification debates and other historical evidence to determine the scope of the States' immunity in a number of contexts even though the ratification debates addressed only certain specific questions about the States' sovereign immunity. *Id.* at 716–17. For instance, although the ratification debates focused on whether a State could be sued by *an individual*, this Court has relied on evidence of the understanding of immunity at the time of ratification to conclude that a State is immune from suits by federal corporations, *Smith v. Reeves*, 178 U.S. 436, 447–49 (1900), foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–32 (1934), and Indian tribes, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779–82 (1991). And although the ratification debates centered on the question of the States' immunity from suit *in federal courts*, this Court has relied on

evidence of the understanding of immunity at the time of ratification to conclude that States are immune from suits in their own state courts, *Alden*, 527 U.S. at 741–43, and in federal administrative agencies, *Fed. Mar. Comm'n*, 535 U.S. at 754–61. *Hall*'s refusal to consider evidence of the understanding of sovereign immunity at the founding, as well as its dismissal of the ratification debates because those debates focused on questions of federal jurisdiction, cannot be reconciled with these decisions. 440 U.S. at 418–20.

B. Furthermore, a review of the historical evidence reveals that *Hall* should have come out the other way. Immunity from suit was an essential attribute of the sovereignty of the States at the time of the adoption of the Constitution. *Alden*, 527 U.S. at 715. Absolute immunity from suit in the absence of consent inhered in the nature of sovereignty under English law. *Ibid.* Blackstone explained that "no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him." 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 235 (1765). This Court has recognized that this aspect of English political theory was never rejected by the States and that "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Alden*, 527 U.S. at 715–16.

Relevant here, the preratification understanding of the immunity of States extended to suits in courts of other States. This is illustrated most prominently by the decision of the Pennsylvania Court of Common Pleas in *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 (1781). In that case, a citizen of Pennsylvania tried to attach property of Virginia located in Philadelphia Harbor. *Id.* at 77–78. The Attorney General of Pennsylvania argued "[t]hat a sovereign, when in a foreign country, is always considered by civilized nations, as exempt from its jurisdiction, privileged from arrests, and not subject to its laws." *Id.* at 78. The Pennsylvania Court of Common Pleas agreed, holding that Virginia was immune. *Id.* at 80.

Nathan was well known to the founding generation. While the case was pending, the Virginia delegates to the Confederation Congress, including James Madison, wrote a letter that argued for the dismissal of the case because it required Virginia to risk its property without appearing or to "abandon its Sovereignty by descending to answer before the Tribunal of another Power." Letter from Virginia Delegates to Supreme Executive Council of Pennsylvania (July 9, 1781), *reprinted in* 3 The Papers of James Madison 184 (William T. Hutchinson et. al. eds., 1963).[3] The Virginia delegates explained that allowing the suit to proceed

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[3] This letter may be found at Founders Online, National Archives, http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=14&sr=.

would be "derogatory to the Rights of Sovereignty of the State of Virginia." *Ibid.*[4] Later, the Attorney General of Virginia, Edmund Randolph, appointed John Marshall as one of two arbitrators, pursuant to a resolution of the Virginia General Assembly, to resolve the dispute between Virginia and Nathan after the Pennsylvania court dimissed Nathan's suit. 8 THE PAPERS OF JAMES MADISON 68 n.1 (Robert A. Rutland et al. ed., 1973).[5] And four years later, the decision of the Pennslyvania court to dismiss was published in the first volume of the United States Reports. 1 U.S. (1 Dall.) at 77.

The conclusion of the court in *Nathan* was consistent with the well-established notion at the time that one sovereign was immune from suit in the court of another sovereign. The leading treatise on international law at the founding, Vattel's LAW OF NATIONS, set forth this principle clearly. Emmerich de Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 155 (Book II, Ch. 4, § 55) (J. Chitty ed., 1883). According to

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[4] The delegates noted that even if Nathan could not bring his action in Virginia's courts, "still the Case would not be without Remedy; as on Petition to the Legislature, the supreme Authority of the State, it would no doubt be attended to, and redressed." *Ibid.*

[5] This source may be accessed at http://founders.archives.gov/?q=Nathan%20NEAR%2F20%20Virginia&s=1111311111&sa=&r=38&sr=.

Vattel, "[o]ne sovereign cannot make himself the judge of the conduct of another." *Ibid.* [6]

The ratification of the Constitution did nothing to abrogate the immunity that States had been understood to enjoy in the courts of other States. See *Alden*, 527 U.S. at 713 (The States retain preratification immunity "except as altered by the plan of the Convention or certain constitutional Amendments."). In fact, though there was no specific consideration of the question, statements during the ratification debates confirm that the States' immunity continued to be understood to include immunity from suit in the courts of other States.

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[6] James Madison relied on Vattel as an authoritative source of the law of nations, *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 9, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed., 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1111311113&sa=&r=36&sr=, and Thomas Jefferson explained that Vattel "ha[d] been most generally the guide" on the "law of nations," *e.g.*, Letter from James Madison to Thomas Jefferson (Jan. 7, 1785), *reprinted in* 7 The Papers of Thomas Jefferson 588 (Julian P. Boyd ed. 1953), *available at* http://founders.archives.gov/?q=Vattel&s=1311311113&sa=&r=96&sr=. Vattel was also cited in two of the State conventions to ratify the Constitution. 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 454 (hereinafter Elliot's Debates) (James Wilson citing Vattel at the Pennsylvania ratification convention); 4 Elliot's Debates 278 (Charles Pinckney explaining at the South Carolina ratification convention that Vattel was "one of the best writers on the law of nations").

In assuring the people that the States would be immune from suit in federal courts, advocates of the Constitution spoke in broad terms that presumed immunity in *all* courts, unless expressly surrendered. Alexander Hamilton explained that immunity from the suit of an individual was "inherent in the nature of sovereignty." The Federalist No. 81, p. 486 (C. Rossiter ed., 1961). Hamilton went on to explain that immunity was "now enjoyed . . . by every State in the Union" and that unless "there is a surrender of this immunity in the plan of the convention, it will remain with the States." *Id.* at 487. James Madison assured the Virginia Convention that "[i]t is not in the power of individuals to call any state into court," and John Marshall assured that Convention that "[i]t is not rational to suppose that the sovereign power Should be dragged before a court." 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 533, 555 (J. Elliot 2d. ed. 1836) (hererinafter Elliot's Debates).

Even advocates of the Constitution who believed that Article III abrogated the States' immunity in federal courts made apparent an understanding that the States would still be immune from suit in the courts of other States. At least one supporter of permitting suits against States in federal court premised his argument on continued immunity in the courts of other States. Edmund Pendleton argued to the Virginia Convention that "[t]he impossibility of calling a sovereign state before the

jurisdiction of another sovereign state[] shows the propriety and necessity of vesting [a federal] tribunal with the decision of controversies to which a state shall be a party." 3 Elliot's Debates 549.

Attorney General Randolph's report on the judiciary to the House of Representatives—delivered shortly after the ratification of the Constitution—is yet more evidence that the States were understood to have retained immunity under the Constitution from suit in the courts of other States. Randolph believed this to be as settled a principle as immunity of the United States itself from suits in state courts. "In like manner," he confirmed that "as far as a particular state can be a party defendant, a sister state cannot be her judge." 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 130 (Maeva Marcus, ed., 1992). He explained that the "unconfederated" States "would be as free from mutual control as other disjoined nations." *Ibid.* The Constitution did not "narrow this exemption." *Ibid.*

All of this historical evidence demonstrates that *Hall*'s admonition that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified,"440 U.S. at 418–19, is true in one sense. "[T]he framers would not have thought such suits possible, and therefore were not worried that they would occur." Amy Woolhandler, *Interstate*

Sovereign Immunity, 2006 Sup. Ct. Rev. 249, 252. In short, "[t]he only reason why this immunity did not receive specific mention is that it was too obvious to deserve mention." *Hall*, 440 U.S. at 431 (Blackmun, J., dissenting).

Indeed, given the significance of sovereign immunity at the time, the absence of specific debate over the question of the States' immunity in sister States is itself telling. As even *Hall* recognized, "the doctrine of sovereign immunity was a matter of importance in the early days of independence," and many States were concerned about being sued in the courts of another sovereign because they "were heavily indebted as a result of the Revolutionary War." 440 U.S. at 418. Given the "well-known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is [thus] most instructive." *Alden*, 527 U.S. at 741. The best explanation for the lack of specifc debate about the abrogation of the States' immunity in the courts of other States is that this immunity "was a principle so well established that no one conceived it would be altered by the new Constitution." *Ibid.*

In fact, the question of a State's immunity in its sister States was so well understood that this Court's decisions *prior* to *Hall* had routinely described the States' immunity in terms that included immunity from suit in other States. This Court explained in 1857 that "[i]t is an established principle of jurisprudence in all civilized nations that the

sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1883) (explaining that the States are immune from suit in "any court in this country"). In *Hans v. Louisiana*, the Court explained that "[t]he suability of a state, without its consent, was a thing unknown to the law." 134 U.S. 1, 16 (1890). And again in 1961, less than two decades before *Hall*, this Court explained specifically that state courts had "no power to bring other States before them." *W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961).

Hall is thus contrary to the preratification history of sovereign immunity, the ratification debates, and the understanding of immunity leading up to the decision in *Hall*. This Court should grant certiorari to vindicate the historical immunity of the States from suit in the courts of other States, which the States retained under the Constitution.

III. *HALL* CONFLICTS WITH THE INTERESTS THAT UNDERLIE SOVEREIGN IMMUNITY.

A. Any limitation on the States' sovereign immunity is harmful to the States and undermines the interests protected by sovereign immunity. Sovereign immunity "assures the states . . . from unanticipated intervention in the processes of government." *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). States must use scarce resources

to meet a number of competing policy goals, and "it is inevitable that difficult decisions involving the most sensitive and political judgments must be made." *Id.* at 751. A limitation of immunity "carries with it substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." *Id.* at 750.

The holding in *Hall* undermines these goals by permitting a court from another State to overrule a State's policymaking decisions. 440 U.S. at 425–27. An exercise of jurisdiction over a State by another State allows the courts of the second State to decide what policy goals the first State should pursue and how it should pursue those goals. These out-of-State suits "place an unwarranted strain on the States' ability to govern in accordance with the will of their citizens," and inject another State's courts into "the heart of the political process" of a State. *Alden*, 527 U.S. at 751. Worse still, the courts of the other State may be tempted to rule in a manner that benefits their own State's citizens, fisc, and policy priorities.

B. This case—in which a California state agency has been subject to litigation in an out-of-State court for more than 15 years—illustrates the problem. California taxes the income of its residents, and the Franchise Tax Board of California ("FTB") conducts audits to enforce California's tax. Gilbert Hyatt filed a tax return with California in 1991 in which he claimed that he moved to Nevada and ceased to be a resident of California days before he received

substantial patent licensing fees. Pet. App. at 4. Hyatt did not report the licensing fees on his California tax return. *Ibid.*

FTB initiated an audit on Hyatt's 1991 tax return based on these discrepancies. Pet. App. at 4. After completing the audit, FTB concluded that Hyatt had not moved to Nevada until April 1992 but had staged an earlier move to avoid California's income tax for his patent licensing income. *Id.* at 6. FTB concluded that Hyatt owed California $1.8 million in taxes from 1991 and added $2.6 million in penalties for fraud and interest. *Ibid.* A second audit concluded that Hyatt owed $6 million in taxes for 1992. *Id.* at 7.

Hyatt contested FTB's actions in both California and Nevada. California provides a procedure for administrative review of tax audits, but Hyatt did not limit his challenges to that procedure. Pet. App. at 7. Hyatt also sued FTB in Nevada court seeking declaratory relief, compensatory damages, and punitive damages for several alleged intentional torts. Pet. App. 7–8, 11.

In the Nevada courts, FTB was denied the treatment it would have received in its home courts in California. Although FTB would be completely immune from suit for an audit in California court, Cal. Gov't Code § 860.2, the Nevada courts denied complete immunity to FTB. Pet. App. 10. Instead, the Supreme Court of Nevada held that California

was entitled to "partial immunity equal to the immunity a Nevada government agency would receive" in a Nevada court. *Ibid.*

On a writ of certiorari, this Court agreed that the Full Faith and Credit Clause did not require Nevada to extend to FTB the full immunity that the agency would have received in a California court, *Franchise Tax Bd. of California v. Hyatt ("Hyatt I")*, 538 U.S. 488 (2003), though several Justices questioned whether the Court's recent decisions suggested that FTB should have sovereign immunity from suit in an out-of-State court, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42). The Court recognized that "the power to promulgate and enforce income tax laws is an essential attribute of sovereignty," but it struggled to find a "principled distinction between [a State's] interest in tort claims arising out of its university employee's automobile accident, at issue in *Hall*, and [a State's] interests in tort claims . . . arising out of its tax collection agency's residency audit." *Id.* at 498. The Court thus concluded that "[t]he Nevada Supreme Court [had] sensitively applied principles of comity." *Id.* at 499. At oral argument, some Justices suggested that *Hall* might no longer be viable and that sovereign immunity might be available, Tr. of Oral Argument at 25:19–32:6, *Hyatt I*, 538 U.S. 488 (No. 02-42), but the Court ultimately declined to address the question because FTB did not ask the Court to do so. *Hyatt I*, 538 U.S. at 497.

When the case returned to the Nevada courts, matters worsened for FTB. The California state agency did not even continue to receive the same treatment that Nevada would have received. Several years after this Court's decision, a Nevada trial court conducted a four-month trial and ruled for Hyatt on each of his intentional tort claims. Pet. App. 11. Nevada law would have limited damages against Nevada, Nev. Rev. Stat. 41.035, but the Nevada trial court awarded almost half a billion dollars to Hyatt, including a $250 million punitive damages award. Pet. App. 11.

Over a decade and a half after this litigation began, the case returned a second time to the Supreme Court of Nevada, which agreed with the trial court's refusal to extend to FTB the damages cap that would have applied to the State of Nevada. Although it ruled for the California state agency on several of Hyatt's claims, the Nevada Supreme Court affirmed the imposition of damages exceeding the statutory cap because Nevada's "policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity." Pet. App. at 45. The court did not consider California's interest in the enforcement of its tax laws. *Id.* at 42–46.

If there were ever a cautionary tale about the potential consequences of *Hall*, this case is it. After more than a decade and a half of litigation, California remains liable for a judgment of over a

million dollars for fraud and must endure another trial to decide damages on a claim of intentional infliction of emotional distress. *Id.* at 72. And the success of this litigation has encouraged similar suits that may force FTB to alter its procedures for enforcing California's tax policies. Pet. 32–33.

Importantly, this is not the only instance in which a court of one State has exercised jurisdiction over another State in a case directly implicating the defendant State's sovereign power to establish and enact policy. State courts have exercised jurisdiction over other States in cases involving the revocation of a degree by a State university, *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992), cert. denied, 510 U.S. 1101 (1994), the firing of a State auditor, *McDonnell v. Illinois*, 725 A. 2d 126 (N.J. Super. Ct. App. Div 1999) aff'd per curiam 748 A. 2d 1105 (N.J. 2000), cert. denied 531 U.S. 819 (2000), and the treatment of indigent patients of a State-run psychiatric hospital, *Nevada v. Superior Court of California*, No. 14-1073.[7]

C. *Hall* suggested that some of the problems of permitting unconsented suits against a State in the

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[7] A petition for certiorari that also presents the question whether *Hall* should be overruled has been filed by Nevada in the last case. Petition for Writ of Certiorari, *Nevada v. Superior Court of California*, 2015 WL 981686 (U.S. Mar. 4, 2015). As noted above, West Virginia has filed a similar *amicus* brief, joined by 33 other States, in support of that request to overrule *Hall*.

courts of another State could be avoided by limiting another State's exercise of jurisdiction to situations that "pose[] no substantial threat to our constitutional system of cooperative federalism." 440 U.S. at 424 n.24. But *Hall*'s hypothetical limitation of immunity fails for at least two reasons to provide adequate protection to the States' sovereign powers.

First, no clear standard can establish which cases pose a substantial threat to cooperative federalism. See *Hall*, 440 U.S. at 429 (Blackmun, J. dissenting) ("[I]t is hard to see just how the Court could use a different analysis or reach a different result in a different case."); *id.* at 442–43 (Rehnquist, J., dissenting) ("I do not see how the Court's suggestion that limits on state-court jurisdiction may be found in principles of 'cooperative federalism' can be taken seriously."). As explained above, this Court has already examined the possibility of such a distinction under the Full Faith and Credit Clause in this case but failed to find a "principled distinction" between cases that pose a substantial threat and those that do not. *Hyatt I*, 538 U.S. at 498. Moreover, every case brought in the court of another State undermines a State's sovereignty simply because it requires the expenditure of finite resources to litigate the matter. See *Alden*, 527 U.S. at 750–51.

Second, even if this Court could devise a standard to distinguish between cases that pose a substantial threat to cooperative federalism and

those that do not, that standard is unlikely to be enforced rigorously, if at all. A state court in another State has an undeniable incentive to be less than diligent in applying such a standard in any case involving relief for that other State or its citizens, as most of these out-of-State suits do. And this Court would be the only neutral arbiter to review such assumptions of jurisdiction—a relatively distant and illusory threat for a local trial court.

* * *

The interest of a State in enacting the policies it chooses through the political process and enforcing those policies in a matter that the State deems prudent should not be—and should never have been—entrusted to the judges in the other States.[8] For this reason as well, this Court should grant certiorari and overturn *Hall*.

CONCLUSION

The petition for certiorari should be granted.

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[8] Although the Constitution permits States to retain the full scope of their immunity in their own courts, as well, many States have chosen to waive that immunity in some circumstances.

Respectfully submitted,

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